BALASUBRAMANIAM MUTHU RAJU

v.

VENKITASAN VYAPURI

HIGH COURT MALAYA, JOHORE BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 194 OF 1973]
15 JANUARY 1985

DAMAGES: *Assessment - Relevant date - Whether date of breach of judgment - Interest - Pre-judgment - Post-judgment - Costs - Whether on High Court scale.*

The plaintiff ("the purchaser") entered into an agreement in writing to buy from the defendant ("the vendor") a piece of land in Johore. Completion date agreed upon was on or about 30 November 1970. The vendor failed to deliver on that date. The purchaser filed an action for wilful breach of the contract of sale. Before the conclusion of the hearing it was agreed between the parties that there was no contest on the issue of liability. The plaintiff agreed to accept 70% of whatever damages the Court assessed, in full settlement of the claim but exclusive of costs to be taxed and paid. The sole question before the Court was concerned with the measure of damages to be awarded.

Held:

[1] The true measure of damages was the value of the land at the date of the breach of contract. *(Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 2 MLJ 174).

[2] Nothing however fell to be paid to the plaintiff by way of general damages on the 70% formula agreed upon. The measure of damages was the market value of the property at the contractual time for completion (RM1,450) less the contract price (RM2,000).

[3] But payments already made by the plaintiff must be refunded as payments made for a consideration which had wholly failed.

[4] Interest was to be paid as follows:

(a) *Pre-judgment interest*

Interest to be calculated on the first payment of RM500 from the date of that payment up to the date of the second payment and from that date to the date of judgment at 8% per annum and the plaintiff to receive 70% of that amount in satisfaction of his pre-judgment interest.

(b) *Post-judgment interest*

Interest to run on the decretal amount at 8% per annum till realisation. Section 11 of the Civil Law Act 1956 did not permit the granting of interest upon interest.

[5] Costs should be awarded on the High Court scale. The case included a claim for specific performance, and the arrangement between the parties for the plaintiff to accept damages instead was reached only in the course of the action. The plaintiff was justified in filing his action in the High Court.

[Judgment for plaintiff.]

Cases referred to:
Engell v. Fitch [1869] LR 4 QB 659
Diamond v. Campbell-Jones [1961] Chancery 22
Central Malaysia Development Co. Ltd. v. Chin Pak Chin [1976] 2 MLJ 174
Rosenthal v. Alderton [1946] KB 374
Vyramuttu v. State of Pahang [1924] 4 FMSLR 277
Noordin bin Mat Dom v. Yahaya bin Mohamed Jalit [1952] 18 MLJ 17
Tara Rajaratnam v. Datuk Jaginder Singh, Datuk Suppiah and Arul Chandran [1983] CLJ (Rep) 892

Legislation referred to:
Civil Law Act 1956, s. 11
Contract Act [Ind], s. 73
Contracts Act 1950, ss. 74, 74(1)
Courts of Judicature Act 1964,s.16,Schedule para.7
Rules of High Court 1980, O. 42 r. 12

Other sources referred to:
On Torts, Salmond, 17th Edn., p. 531
On Damages, Mac Gregor, 13th Edn., para. 678
Indian Contract and Specific Relief Acts, Pollock & Mulla, 9th Edn., p. 576
Indian Contract Act, A.C. Dutt, 4th Edn., p. 676
The Law of Contract in Malaysia and Singapore - Cases and Commentary, Visu Sinnadurai

For the plaintiff - Subra Naicker; M/s. Subra Naicker & Co.
For the defendant - C.K.G. Pillay; M/s. Hassan Yunos & Co.

JUDGMENT

Mahadev Shankar J:

The sole question with which this judgment is concerned is the measure of damages to be awarded to a purchaser arising out of a wilful breach of contract for the sale of land by a vendor. Counsel for the plaintiff contends that these damages should be assessed based on the value of the land at the date of the judgment. Defence Counsel however submits that the crucial date for this exercise is the date on which the breach occurred.

The facts in so far as they are relevant are as follows:

On 26 December 1969 the plaintiff who is hereafter referred to as the purchaser entered into an agreement in writing to buy from the defendant, hereafter referred to as the vendor, a piece of land held under Q.T. 65 for Lot No. MLO 2104 containing an area of 1 acre 1 rood and 16 poles situate in the Mukim of Sedenak, District of Kulai, State of Johore for the sum of RM2,000. The land is hereafter referred to as the said land.

The purchase price was to be paid in installments and completion was to take place on or about 30 November 1970.

It did not take place on that day. Each party has got its own story to tell as to why this happened but for the purposes of the present exercise I must assume that the vendor admits that he was in breach of contract as on 30 November 1970.

The heat generated by the differences between the parties at that time was such as to convince the plaintiff that it was in his best interests to vacate the said land on or about that day, and he did so.

The subsequent correspondence initiated by the purchaser through his solicitor did not produce any effect and on 8 September 1973 the purchaser filed this action. For a variety of reasons which need not detain us here the matter did not come on for hearing until 30 October 1983. Thereafter the parties called their respective witnesses and before the conclusion of the hearing it was agreed between the parties that there be no contest on the issue of liability and that the Court assess damages on the basis that liability was settled. The plaintiff expressly agreed to accept 70% of whatever damages the Court assessed, in full settlement of the claim, but exclusive of costs to be taxed and paid.

The only evidence relevant to this issue is that given by PW2 Mohd. Kepol bin Bidin, a retired appraiser. In a nutshell his evidence was that the value of the said land as at 30 November 1970 was RM1,450 only but that the current market value on 2 September 1983 was RM29,000. In cross-examination the witness's evidence on the latter figure turned out to be quite shaky. He admitted that the value could fluctuate between RM16,000 and RM29,000. In the light of my judgment which follows the rest of the evidence which went to the possible value of the land in November 1983 is really irrelevant and need not detain us here.

In his final submission, Counsel for the plaintiff argued that a duty to mitigate damages only arose in tort but not in contract and the damages which the plaintiff should be awarded should put him in the same position as he would have been had the land been transferred to him. Therefore it was urged that the Court should give him by way of damages the value of a similar piece of land today. Since the plaintiff's valuer had stated in his report that the value of the said land in September 1983 was RM29,000 and had gone on to state in his evidence at the trial that it could possibly even be RM100,000, the figure that should be awarded by the Court was something between these two amounts.

No authority was cited for these propositions.

After judgment was reserved Defence Counsel brought the attention of the Court to 3 cases to support the view that damages ought to be assessed as at 1970 when the breach occurred and not as at the date of the Judgment. These cases were *Engell v. Fitch* [1869] LR 4 QB 659, *Diamond v. Campbell-Jones* [1961] Chancery 22 and *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 2 MLJ 174. *Rosenthal v. Alderton* [1946] KB 374 was also cited to show that only where a claim is based on detinue or conversion can the plaintiff claim the price at the time of judgment.

In response the plaintiff's Counsel put in a written submission in which he maintained his view that the true measure of damages would be the value of the land as at the date of judgment.

The authorities cited in support of this view were *Salmond on Torts* - 17th Edn., p. 531, s. 74 of the Malaysian Contracts Act 1950 (Act 136 Revised 1974), *Vyramuttu v. State of Pahang* [1924] 4 FMSLR 277, *Noordin bin Mat Dom v. Yahaya bin Mohamed Jalit* [1952] 18 MLJ 17 and *Tara Rajaratnam v. Datuk Jaginder Singh, Datuk Suppiah and Arul Chandran* [1983] CLJ (Rep) 892. He also sought to immunize the plaintiff from the effect of *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 2 MLJ 174 by contending (if I have understood his argument properly) that the decision cannot be reconciled with the clear words of s. 74(1) of the Contracts Act which states that the party who suffers by such a breach is entitled to receive compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach.

The point with which we are specifically concerned in the present matter did not arise for decision either in the case of *Vyramuttu* or *Noordin bin Mat Dom. Tara Rajaratnam's* case was one concerning tort.

But the point did arise in *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* and in my view that decision is on all fours with the problem with which we are now concerned.

No useful purpose will be served in dealing with that judgment in detail here. Suffice it to refer to the passage appearing at p. 177 where the relevant paragraph begins with this statement:

> The normal measure of damages is the market value of the property at the contractual time for completion less the contract price.

In other words the market value of the property is to be assessed as on the date on which the breach of contract occurred. The passage just quoted and the discussion which followed is almost on identical lines with the language of *MacGregor on Damages* - 13th Edn., para. 678 which must be taken, therefore, as having been cited with approval by the Lord Chief Justice Emeritus Tan Sri S.S. Gill as also representing the law in Malaysia on the point. I hold myself bound by that decision and feel compelled to follow it.

That there is no doubt that this view is correct is also borne out by the passage in Pollock & Mulla on the *Indian Contract and Specific Relief Acts* 9th Edn., at p. 567 where the authors state in a commentary to s. 73 of the Indian Contract Act that:

> Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money paid for it - *Nagardas v. Ahmad Khan* [1895] 21 Bom. 175; *Venkataswami v. Venkayya* [1953] AM 529. In view of this unanimous current of authority the failure of an attempt to dispute it in Sind; *Ram Singh, Kundan Singh v. Sajan Damji* [1927] AS 120; 101 IC 704, was hardly worth recording.

I would also refer to A.C. Dutt on the *Indian Contract Act* 4th Edn., at p. 676 where the learned author states:

> The question is how much worse off is the vendor by reason of the loss of the purchase money in consequence of the non-performance of the Contract, in other words, the law in this country differs from the English Law and allows damages the measure of which ordinarily is the difference between the contract price and the market price at the date of breach. The vendors are bound to minimize the loss.

I note that *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* has been fully incorporated into *The Law of Contract in Malaysia and Singapore - Cases and Commentary* - by Visu Sinnadurai.

Applying the law to the facts of this case I obtained the following result. The plaintiff had contracted to buy the said land for RM2,000. But on the date of the breach of this contract the land was worth only RM1,450. He therefore did not suffer any damages by way of loss of bargain.

Nothing therefore falls to be paid to him by way of general damages on the 70% formula which the parties have agreed upon.

But the plaintiff did pay RM500 upon signing the agreement and a further RM1,100 on 4 November 1970. These payments were made for a consideration which had wholly failed and I accordingly ordered that the defendant do pay the plaintiff the sum of RM1,600.

Two subsidiary issues now remain. The first is the question of interest. Whilst the defendant has had the use of this money since 1970 the fact is that it is the plaintiff who has had the conduct of this action. The suit was not filed until 8 September 1973 and no serious effort appears to have been made by the various solicitors who acted for the plaintiff from time to time to bring on the case to trial. I would however like to hear further arguments as to when interest should properly commence.

The other issue is the question of costs. The amount awarded is within the jurisdiction of the Magistrate's Court and while the plaintiff will have his costs of this action the scale on which such costs should be awarded is also a matter on which further argument is invited. (Counsel for the parties then addressed the Court on interests and costs.)

On the question of interest, Mr. Pillay suggested that interest should run at 6% per annum from the date of the filing of the writ up to realisation since the defendant did not wilfully keep the plaintiff's money. But Mr. Subra Naicker pointed out that s. 16 of the Judicature Act and Art. 7 of the Schedule empowered the Court to grant interest up to a maximum of 8% per annum on any judgment debt but left the date on which such interest was to commence at large. He also referred to s. 11 of the Civil Law Act 1956. This grants power to Courts to award interest on debts and damages at such rate as the Court thinks fit for the whole or any part of the period between the date when the cause of action arose and the date of judgment. Finally, he referred to O. 42 r. 12 of the Rules of the High Court which states that every judgment debt shall carry interest at the rate of 8% per annum or at such other rate not exceeding 8% such interest to be calculated from the date of the judgment until the judgment is satisfied.

Mr. Pillay emphasized that the plaintiff had not acted with due diligence in filing this action or in prosecuting it but the point here is that the defendant has had the use of the plaintiff's money from the date on which it was paid to him and in view of the earlier arrangement between the parties that the plaintiff was to have the benefit of 70% of any award of the Court, I held that the requirements of justice would be satisfied if interest is calculated on RM500 from 26 December 1969 up to 4 November 1970 and on RM1,600 from 4 November 1970 up till today at 8% per annum and the plaintiff do receive 70% of this amount in satisfaction of his pre-judgment interest. As from today interest will run on the decretal amount of RM1,600 at 8% per annum till realisation. Section 11 the Civil Law Act does not permit the granting of interest upon interest.

As to costs Mr. Pillay submitted that it should be on the Magistrate's Court's scale since if the plaintiff had made proper enquiries as to the measure of damages which could be awarded he should have been fully congnizant that the matter was within the jurisdiction of the Magistrate's Court. Mr Subra Naicker, however, pointed out that when this action was filed it included a claim for specific performance which was not within the jurisdiction of the Subordinate Courts. When the case came on for trial a claim for specific performance was included and the arrangement between the parties to accept damages instead was only reached in the course of the action. It seems to me that the proper approach which the Court should take in such matters is not to be influenced merely by the size of the decretal amount but also to look to whether there were good grounds for the action to be filed in the High Court. In this case I think that the plaintiff was justified in filing his action here even though the delay in prosecuting the action calls for considerable criticism.

Happily Counsel for both parties agreed to leave it to the Court to fix a lump sum by way of costs of this action and in the exercise of my discretion I order that a sum of RM1,800 be paid to the plaintiff in full satisfaction of his party and party costs such sum to include all disbursement and the valuer's fee.

Judgment is therefore granted in favour of the plaintiff accordingly.

Also found at [1985] 2 CLJ 37